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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1397

CHARLES CATER, GULF AMERICAN FIRE & CASUALTY CO.,

Petitioners,

versus

GORDON TRANSPORT, INC., and INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Charles Cater, and Gulf American Fire and Casualty Company, pray that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal of petitioners' claims and rendered against them on February 5, 1968.

Opinions Below

The District Court for the Eastern District of Louisiana, Baton Rouge Division, rendered no opinion; the Judge's reasons for granting respondents' motion for a directed verdict appear at pages 225 through 248 of the printed record filed herewith. Pertinent excerpts are reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment dismissing petitioners' action, is reprinted as Appendix "B" hereof.

Jurisdiction

Original federal jurisdiction of this cause was predicated upon the diverse citizenship of the parties and vested in the United States District Court pursuant to the provisions of 28 U.S.C.A. §1332(a) (1).

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C.A. §1254(1).

Questions Presented

1. Is either party to civil litigation entitled to a directed verdict where the evidence, although stipulated, admits of reasonable conflicting factual inferences?

2. In order to avoid an adverse directed verdict, must a party offer evidence to establish facts which his adversary has admitted in a pretrial stipulation Order?

Constitutional Provisions and Statutes Involved

Federal Constitutional Provisions:

Amendment VII:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Statutes:

Rule 38(a), Federal Rules of Civil Procedure: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 16, Federal Rules of Civil Procedure: "In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof; . . .

"The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . ."

Statement of the Case

Petitioner, Charles Cater, brought this diversity-jurisdiction personal injury claim against the respondents for injuries which he allegedly sustained on March 16, 1965, when, he contended, while painting from a scaffold suspended beneath a highway overpass, some part of respondent's truck struck some part of petitioner's scaffold and knocked him and the scaffold to the ground.

Via a pre-trial Order, formulated pursuant to the provisions of Rule 16, F.R.C.P., respondent admitted that it "was the owner of the vehicle involved in said accident of March 16, 1965 . . ."

Relying principally upon that admission, petitioner offered no other direct evidence to connect respondents' truck with his fall and injuries; the District Court granted respondents' motion for a directed verdict on the ground that petitioner had offered no evidence from

which a jury might reasonably infer that respondents' truck had collided with petitioner's scaffold.

From an adverse judgment entered upon this directed verdict, petitioner appealed to the United States Court of Appeals for the Fifth Circuit; that Court affirmed the judgment dismissing petitioner's suit on February 5, 1968. (Appendix "B")

Hence, petitioner has filed this application for certiorari, pursuant to the provisions of 28 U.S.C.A. §1254 (1).

Reasons for Granting this Petition

The instant petition presents to this Honorable Court for its consideration the place, purpose and effect of pre-trial Orders promulgated pursuant to Rule 16 of the Federal Rules of Civil Procedure and currently in extensive use in the District Courts throughout the United States.

The Courts below have failed to accord proper significance and effect to the pre-trial Order entered by the District Court in this case and, in so doing, have deprived petitioner of his right to a trial by jury as preserved in Rule 38(a) of the Federal Rules of Civil Procedure and as guaranteed by the Seventh Amendment to the Constitution of the United States.

Argument

The focal point of this application for certiorari rapidly refines itself into one narrow inquiry:

Should the District Court have allowed the jury to decide whether or not, in view of respondents' admission that their truck was "the vehicle involved" in petitioner's "accident of March 16, 1965," respondents' said vehicle had struck and dislodged the scaffolding on which petitioner was working prior to his fall and injuries?

The appellate decision of which review is here sought has resolved that question in the negative, principally upon the conclusion that "mere 'involvement', in an accident does not connote anything more than an interest in or connection with" that accident.

It is petitioner's contention that the Court of Appeals for the Fifth Circuit has erroneously arrogated unto itself the prerogative of the jury in this case.

This Honorable Court long ago held that:

> "Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, *the facts being undisputed,* fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." *Gunning v. Cooley,* 281 U.S. 90, 94, 74 L.Ed. 720, 724 (1929) (Emphasis added).

The appellate opinion below goes to considerable lengths to establish that respondents did not "admit a collision" between their truck and petitioner's scaf-

fold, even though it is undeniable that respondents did admit that their truck was "involved in the accident."

With due respect to the Appellate Court, it is submitted that, except for the instant litigation, the phrase "involved in an accident" has never been used in any known reported case other than to connote precisely what the word "involved" invariably means in everyday parlance, namely, that the actor or person implicated was "in an accident," "had an accident" or was an active party in the subject matter of the litigation.

This phrase, "involved in an accident," has been construed consistently by the courts to legally implicate the "involved" party. See *Culver v. Kern*, 193 S.W. 2d 602, 604, 354 Mo. 1158, 166 ALR 644 and *Miner v. Bettendorf*, 157 N.Y.S. 2d 27, 28, 2 A.D. 2d 951. Conversely, it has been held that the driver of an automobile who is "merely in the vicinity of an accident" is not "involved" therein. *Butler v. Jersey Coast News Company*, 160 A. 659, 661, 109 N.J.L. 255.

From the foregoing it appears that the respondents' admission in the instant case would not seem even to be susceptible of the meaning ascribed to it by the Court of Appeals for the Fifth Circuit. Surely, however, the conclusion drawn by that Court was not so exclusive as to support a motion for a directed verdict. Fair-minded men might, at least, have concluded that the "involvement," of respondents' truck was in fact its striking petitioner's scaffold. Therefore, no directed verdict should have been granted. *Richmond and D. R. Co. v. Powers*, 149 U.S. 42, 37 L.Ed. 642 (1893).

In support of its conviction that respondents did not "admit a collision" the Court of Appeals seems to have been influenced by the averments of respondents' answer to the complaint filed in this cause. The Court states:

> "It is perfectly clear that Gordon had no intention of admitting a collision occurred for in its very first responsive pleading, its answer to plaintiff's complaint, Gordon stated 'it is specifically denied that any such vehicle struck or collided with the plaintiff.' "

Petitioner respectfully submits that consideration by the Court of Appeals of the bare averments contained in respondents' original answer to the complaint in this matter is inconsistent with the pre-trial procedure authorized by Rule 16 of the Federal Rules of Civil Procedure and employed by the District Court.

In pertinent part, Rule 16 provides that the pre-trial Order may, and it certainly did in this case, recite that "when entered" it "controls the subsequent course of the action. . . ."

If, after unqualifiedly admitting its involvement in the basic subject matter of litigation, a party may then successfully contend that his adversary has offered no evidence to prove that which the party has admitted, we respectfully submit that one of the principal purposes of Rule 16 of the Federal Rules of Civil Procedure would be totally frustrated.

This Honorable Court has not heretofore directly considered in a litigated matter the effect of pre-trial Order stipulations by parties. The procedure contemplated by Rule 16 and recommended at 37 F.R.D. 271 is widely used by District Courts throughout the nation. Such procedure is regarded as a valuable means by which to clarify and simplify the issues of litigation, thereby reducing trial time and Court congestion. However, by relying upon the efficacy of his adversaries' pre-trial admissions, petitioner has been effectively denied his constitutional right to a trial by jury in this case. This petition thus presents a substantial question as to the extent to which a litigant may safely rely upon his adversary's admissions because, if they are to be interpreted as restrictively as the courts below has interpreted them in this instance, litigants and their legal advisers will be unduly inhibited in pre-trial dealings with their opponents.

Conclusion

For the foregoing reasons this petition for certiorari should be granted, to the end that this Honorable Court will review the decisions below, hold that the District Court should not have taken this case from the jury, hold that the United States Court of Appeals for the Fifth Circuit should not have affirmed said action of the District Court and remand this case to the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, for a new trial;

All of which is

Respectfully submitted,
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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing petition for certiorari have been served upon respondents, Gordon Transport, Inc. and Insurance Company of North America, by depositing the same, postage prepaid, in the United States Mails, addressed to Roger M. Fritchie Esq. at ~~New Orleans~~ Baton Rouge, Louisiana, this 2nd day of ~~April~~ May, 1968.

SAMUEL C. GAINSBURGH

APPENDIX A

[231] there and the next thing he was in the hospital.

MR. HEBERT:

There was an impact, your Honor. The testimony is certainly subject to that fact; he was painting on the scaffold in the usual, normal fashion from his testimony together with the physical situation after the accident, clearly is evidence of the impact. And the impact clearly could have come from and the jury could infer that it came from that Gordon truck that was stopped right there at the scene with this scaffolding that had been knocked down right beside it.

I merely want to make this further observation: certainly everything that could be accomplished by a motion for directed verdict could be accomplished on a motion after verdict.

THE COURT:

Yes, but what you want to do is to have the advantage of cross examining witnesses that you did not call, in order to prove your case by cross examination of other witnesses. Of course, you are not entitled to that. If you in fact have not made out a case in your case in chief, you are not entitled to rely on the cross-examination of defendant's witnesses when you have not made out a prima facie case in your case in chief. The defendant has no obligation to produce

* * * *

[234] caused by the negligence of the defendant's truck driver?

MR. HEBERT:

To prevail against a motion for directed verdict, your Honor, I don't have to prove by a preponderance of the evidence; I merely have to make out a prima facie case, a state of facts from which reasonable men could draw conflicting inferences. I earnestly and vigorously contend that I have done that.

THE COURT:

You keep telling me that.

MR. HEBERT:

May I have the photographs I originally used?

THE COURT:

Yes.

THE COURT:

Tell me now what evidence there is upon which the jury could conclude properly that the defendant is guilty of negligence? There is no evidence that he was speeding; there is no evidence that he improperly entered under the bridge; there is no evidence that he struck the cable; no evidence that he knocked this scaffolding.

MR. HEBERT:

I think we have two separate and distinct questions, your Honor. First of all, whether or not it was his vehicle that collided with this thing or some part of it, thereby causing [235] it to fall. The evidence on that is as follows: Number one: there isn't a shred of evidence that anything else could have, considering that

this board was anchored, and that some sort of force had to strike it. I must take issue with your Honor. I believe the testimony of Mr. Charles Cater is clearly open to the inference — I don't think the inference is compelled, but is clearly open to the inference that the scaffold upon which he was working was struck. He said that he was working and all of a sudden something threw him off.

Now, that obviously could not happen except by something colliding with this scaffolding.

THE COURT:

Mr. Hebert, let me ask you this: This would place you in the position of being able to come to Court and do nothing but show this jury pictures and then have all of your witnesses on cross-examination, because then you made the defendant come in and defend this case and then you have all of the advantages of cross-examination of his witnesses to prove your case.

MR. HEBERT:

I don't know how in the world that would ever be, your Honor.

THE COURT:

That is what you are doing right now.

* * * *

[237] Now, that, I believe, establishes impact, and the presence of this truck, as testified to by Mr. Higgins, on that scene with nothing else that could have

caused such an impact, within minutes thereafter, certainly shows that an impact occurred.

Now, let's pass on to the hurdle of negligence. We have here from the photographic evidence and the description given by the witnesses, an object which had been there for quite some period of time, not necessarily with Mr. Cater, but with others; a truck driver who is well aware that it was there; he had to have seen it, it was there, just as I have to see your Honor, and this was in broad daylight with no obstruction to vision; and other trucks had successfully negotiated it; and the record at this point is undisputed that in going through the underpass, he struck it.

THE COURT:

But what says he struck it?

MR. HEBERT:

I'm repeating, your Honor, it is undisputed that he struck it. There is evidence to prove that he struck it.

THE COURT:

You say it is undisputed.

MR. HEBERT:

I'm sorry; it was a poor choice of words. I won't say it's undisputed; the evidence is that they can infer that he struck it.

[238] And I think there is strong evidence —

THE COURT:

I don't believe that you can infer negligence, because

the man is presumed to be driving with care, is he not, unless you introduce some evidence to show that he was not.

MR. HEBERT:

I believe, your Honor, that if we have produced evidence to show that an individual struck something that was in plain view —

THE COURT:

But you haven't shown that he struck something, have you?

MR. HEBERT:

Well, I repeat, I think we have two entirely separate issues here and we may be in danger of getting them confused. Now, as to the evidence of whether or not he struck it, I repeat it is there in the form of the photographs, the fact that that scaffolding had to have been knocked down by something that struck it with considerable force; there isn't any evidence or any indication of anything else that could have knocked it down other than the truck that was right there at the site. So that is the one issue, is the fact of impact. Is there sufficient evidence as to that? And I submit, your Honor, that there is.

Now, once we assume that there is, the next question I assume your Honor is posing is is there [239] sufficient evidence from which a jury could infer that assuming that Gordon Transport struck this scaffold, is there evidence from which a jury could infer that he was negligently operating his rig? Again I respectfully submit that there is. He struck an object that was

lawfully where it was, in a position where it had been countless times before, in plain view, and which had been passed a number of times by rigs identical with that; with no difficulty, and if he collided with it, I certainly think that twelve good men and true could conclude that he was not exercising a careful lookout. If he had looked, he would have seen it and had he seen it, he could have stopped.

MR. FRITCHIE:

Your Honor, may I make one comment about a factual matter which I overlooked and which Mr. Hebert has brought out?

Mr. Hebert has brought out by his own witness, Mr. Cash, that when he went to the scene the next day or the next morning, he found a broken cable on the East side of the highway. Everything in evidence thus far indicates, and this is from Mr. Higgins and others who said that plaintiff was in where this turn lane is now, that our truck was over here headed in a southerly direction, shows

* * * *

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24564

CHARLES CATER and GULF AMERICAN FIRE AND CASUALTY COMPANY,

Appellants,

versus

GORDON TRANSPORT, INC., ET AL.,

Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(February 5, 1968.)

Before GEWIN, BELL and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal from an order and judgment granting a motion for a directed verdict for the defendants below, Gordon Transport, Inc. (Gordon) and its insurer, The Insurance Company of North America (INA). The plaintiff-appellant, Charles Cater (Cater) filed a complaint in neg-

ligence in the United States District Court for the Eastern District of Louisiana arising out of alleged personal injuries incurred while he was painting the underside of an overpass of Interstate Highway I-10. Gulf American Fire and Casualty Company intervened as the workman's compensation insurer of Cater's employer. The case was tried before a jury on December 7, 1966. At the close of the plaintiffs' case, the defendants moved for and were granted a directed verdict rejecting the claims of the plaintiff and intervenor and dismissing plaintiffs' suit with prejudice. From the judgment entered on this verdict plaintiffs appealed. We have concluded that the record amply supports the district court's direction of a verdict for the defendants in this case and affirm.

Cater was a spray painter employed by the firm of Becnel-Groetsch and Company. He had been working steadily for them for approximately five months prior to the accident. On March 16, 1965, he was spray-painting the underside of the Louisa Street overpass in New Orleans, a part of interstate highway I-10. The underside of an overpass is painted from a device known in the trade as a "pickboard". A pickboard is a type of scaffolding which sits on two ladder-like hangers and is suspended from the overpass by cables. The board on which the painter stands is of aluminum construction and is attached to these hangers by either an iron bar struck through to keep it from slipping or the rung of the pickboard may be tied to the rung of the hanger. The hangers are suspended from cables which are strung

parallel to the bridge so that the pickboard is at right angles to the span.

The particular pickboard upon which Cater was working was twenty-four feet in length and one foot wide. On the ground beneath it was a compressor used to supply air through the spray hose. The weather was clear on March 16, and the pavement was dry. Warning signs were placed at the approaches to the underpass and the pickboard was in clear view of approaching motorists. At about 4:30 P.M. the pickboard fell, seriously injuring Cater. Immediately after the fall a tractor-trailer truck belonging to Gordon and being driven by its employee, Jules Lion,[1] was seen halted beneath the overpass. A support cable was found broken on the eastern side of Louisa Street and one end of the pickboard was also on the pavement. As a result of his fall, Cater suffered serious injuries.

As its case in chief, counsel for appellant called as its witnesses Charles E. Higgins, Jr., a state highway department paint inspector who arrived at the scene of the accident shortly after it occurred; James Cash, plaintiff's foreman, who testified concerning the construction of the pickboard; Charles Cater, the plaintiff, who testified "[T]he only thing that I can remember is that I was painting and then I woke up in the hospital;" and Doctors Roy, Meade, and

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[1]It was stipulated in the pre-trial order that the truck was owned by Gordon Transport, Inc. and was being driven by its employee, Jules Lion, who was acting within the line and scope of his authority at the time of the accident.

Cline[2] who testified as to the extent of Cater's injuries. After presenting only these witnesses, counsel for plaintiff rested. Defendants then moved for a directed verdict and the motion was granted. The trial judge stated that "the plaintiff has failed to introduce or offer any evidence of any kind to even show that the truck *collided* with anything; . . . he has failed completely to show any negligence on the part of the driver of the truck. . . ." (Emphasis added)

Although jurisdiction in this case is based upon diversity of citizenship, and therefore state law is controlling as to the elements of the cause of action, the question of the sufficiency of the evidence to go to the jury on a motion for directed verdict pursuant to Rule 50, F.R.Civ.P. is controlled by federal law. Essentially the issue is the relationship of the judge and jury in the federal judiciary with constitutional underpinnings of the right to a jury trial under the Seventh Amendment. The question is not whether a certain element is a part of a prima facie case which must be proven, but only whether certain facts are sufficient to prove the state-determined elements. This must be decided by federal, and not state law. *Planters Manufacturing Co. v. Protection Mutual Insurance Co.*, 380 F.2d 869 (5 Cir. 1967); *Turner v. Atlantic Coast Line R.R.*, 292 F.2d 586 (5 Cir. 1961); *Reuter v. Eastern Air Lines*, 226 F.2d 443 (5 Cir. 1955); *Lowry v. Seaboard Airline R. Co.*,

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[2]The deposition of Dr. Frank X. Cline, Jr., was read into evidence since he was unable to appear at the trial personally.

171 F.2d 625 (5 Cir. 1948).[3] The controlling principle of federal law, therefore, which must be applied is that if the evidence is of such a character that reasonable men exercising impartial judgment may differ in their conclusion, then the case should be submitted to the jury. *Helene Curtis Industries, Inc. and Cosmair, Inc. v. Pruitt,* . . . . F.2d . . . . (5 Cir. 1967); *Fidelity and Casualty Company of New York v. Funel,* 383 F.2d 42 (5 Cir. 1967); *McPherson v. Tamiami Trail Tours, Inc.,* 383 F.2d 527 (5 Cir. 1967); *Herron v. Maryland Casualty Company,* 347 F.2d 357 (5 Cir. 1965); *Turner v. Atlantic Coast Line R.R.,* 292 F.2d 586 (5 Cir. 1961).

Appellant contends that there was some evidence from which the jury could have reasonably inferred that (1) a collision between the truck and the pickboard or its supporting cables did, in fact, occur; and (2) the truck driver was negligent in causing the collision. As evidence that there was a collision between the truck and the pickboard or cables, appellant points to certain parts of the record to support his argument that Gordon admitted a collision. For example, in answering interrogatories requiring Gordon

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[3]The Supreme Court declined to decide this exact question in Dick v. New York Life Insurance Co., 359 U.S. 437, 3 L.ed.2d 935 (1959) since both parties assumed state law applied. See also Mercer v. Theriot, 377 U.S. 152, 12 L.ed.2d 206 (1964). The Courts of Appeals are divided on this question, but the majority view, and clearly the view of this Circuit, is that federal law applies. The case of Miller v. Boston Insurance Company, 271 F.2d 9 (5 Cir. 1959) is a maverick case on this point and is the sole authority for applying state law in this Circuit. The correct position in that case is stated by Judge Rives in his concurring opinion.

to, *inter alia*, list all of the driver's accidents by date, the last listed is "March 16, 1965, this accident."[4] In addition, paragraph 6 of the pre-trial order covering stipulations and admissions of the parties provided in part that: "It is admitted . . . that the defendant . . . was the owner of the vehicle involved in said accident of March 16, 1965 . . ." In spite of counsel's vigorous assertion that these statements are admissions that a *collision* occurred, mere "involvement" in an accident does not connote anything more than an interest in or connection with the accident. From anything appearing in the record, the involvement admitted here was only physical presence at or near the scene at the time of the accident, and there is no evidence showing a collision.

We are also not convinced that the statement by defendant's counsel in his opening statement to the jury in which he said ". . . the accident occurred generally as described by the Court and by Mr. Hebert . . ."[5] is an admission of a collision. Any possible such inference is rebutted by defendant's counsel's own description of the accident and his statement that Gordon was free of any negligence. It is perfectly clear that Gordon had no intention of admitting a collision occurred for in its very first responsive plead-

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[4]This phrase was excluded by the district court, but since Gordon admits elsewhere that its driver was involved in the accident to the extent that he was present at or soon after Cater fell, no prejudice could have resulted from its omission.

[5]Mr. Hebert, counsel for plaintiff, in his opening statement had said in describing the accident that "some part of the truck struck some part of the scaffolding, knocking Mr. Cater to the pavement of Louisa Street. . . ."

ing, its answer to plaintiff's complaint, Gordon stated "it is specifically denied that any such vehicle struck or collided with the plaintiff." One does not waive such a defense by proceeding to alternatively allege contributory negligence.

There being no admission of a collision, we must look to the record to determine if any evidence was introduced from which the jury could have reasonably concluded that a collision occurred. Neither the photographic exhibits which were admitted into evidence, nor the location of the pickboard before and after the accident constitute any such evidence.

The Louisiana courts have frequently and consistently held that a motorist who collides with a stationary vehicle or other object on the highway is presumed to be guilty of negligence. *Superior Industries, Inc. v. T. Smith & Sons, Inc.*, 187 So.2d 538 (La. 1955); *Giorlando v. Maitryian*, 22 So.2d 564 (La. 1945); *Becker v. Mattel*, 165 So. 474 (La. 1936). It is unnecessary for us to consider the possible problem which might arise in the federal courts in applying such a presumption. The Louisiana rule requires a collision, there is no proof here that a collision occurred, so no presumption of negligence can arise.

The facts in this case are highly analogous to those in the case of *Herron v. Maryland Casualty Company*, 347 F.2d 357 (5 Cir. 1965). There the plaintiff alleged that he was seriously injured when a construction company employee drove a truck into the front end of a tractor he was operating, causing a large clod of

earth to fall upon him from the front-end loader of the tractor. There, as in the instant case, there was no evidence of a collision and the plaintiff was unable to state whether there had been a collision or not. This court upheld the directed verdict of the district court.

We conclude that the record amply supports the action of the district court in directing a verdict for the defendants and affirm.

AFFIRMED.